BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

INGEBURG HUNSECKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,229
ENTERPRISE ESTATES NURSING CENTER	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP, INC.	)	
Insurance Carrier	)	

ORDER

Claimant and respondent have both appealed from an Award entered by Special Administrative Law Judge Douglas F. Martin is dated May 21, 1996. The Appeals Board heard oral arguments November 5, 1996.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffrey A. Chanay of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award and has considered the record identified in the Award.

ISSUES

The Special Administrative Law Judge ordered benefits for a 25 percent permanent partial work disability. Respondent contends the award should be limited to functional impairment. Claimant, on the other hand, argues that she should be entitled to a higher work disability. The nature and extent of claimant's disability is the sole issue to be considered on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons stated below the Appeals Board concludes that the award should be increased and the claimant should be entitled to benefits for a 59.5 percent work disability.

Claimant injured her low back in a fall at work on August 10, 1993. Respondent acknowledged compensability of the claim and the parties have stipulated to a 14.5 percent functional impairment. At one point claimant also alleged injury on April 6, 1994. The Special Administrative Law Judge found the April 6, 1994, injury caused only temporary exacerbation of the previous injury. That finding is not disputed on appeal and August 10, 1993, will be treated as the only accident date for purposes of permanent disability.

The dispute in this case concerns the application of work disability standards set forth in K.S.A. 44-510e, as amended. Each party phrases the issue somewhat differently. The differences in their descriptions of the issue, in effect, states their argument. Respondent states that the issue is whether a claimant should be entitled to work disability if she quit accommodated employment without requesting further accommodation and without medical direction. Claimant, on the other hand, states that the issue is whether respondent has made a reasonable offer of accommodation.

The Appeals Board would describe the issue differently than either party. The statutory language at issue is the language found in K.S.A. 44-510e, as amended, which states:

> "An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.)

In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) the Court of Appeals construed similar language found in this same statute prior to 1993 amendments. At that time the statute provided for a presumption of no work disability when the claimant engaged in work at a comparable wage. The Court there held that a claimant who refuses to even attempt offered employment within the work restrictions should be treated the same as an employee who engages in work at a comparable wage and should be limited to an award based upon functional impairment. In Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995), the Court of Appeals clarified the principle stated in Foulk. In that case the Court of Appeals rejected an argument that claimant should be limited

to functional impairment where the claimant attempted the work and was terminated when she advised her employer the work was causing her problems. The facts mentioned in the Guerrero decision include expert medical opinion indicating the work was not appropriate for claimant's injury. The Court of Appeals distinguishes Foulk, however, primarily on the basis of the fact that the claimant in Guerrero did not refuse to attempt the accommodated employment.

On the basis of these decisions, the Appeals Board concludes that the fiction, treating claimant as engaging in work at 90 percent of the preinjury wage, is not to be applied except where claimant's conduct is equivalent to refusing to attempt accommodated employment. We considered the conduct equivalent in those cases where the evidence establishes that the claimant accepted the offer but did not make a good faith effort to perform accommodated employment. Banuelos v. Excel Corporation, No. 180,288 (May 1996).

When this standard is applied to the facts of this case, the Appeals Board concludes that the evidence does not establish claimant failed to make a good faith effort at the accommodated employment or engage in conduct which should be treated as equivalent to refusing to attempt the employment. The reasonableness of respondent's accommodation and claimant's conduct in leaving the employment are both factors relevant to the determination.

Most of the material facts are not in dispute. After the injury in August 1993, claimant continued to work for respondent until early June 1994. At that time claimant was given permanent restrictions from Dr. Manguoglu. Those restrictions included occasional lifting not more than 55 pounds and avoiding repetitive forward bending and twisting of her back. When claimant advised the respondent of these restrictions, she was told that they no longer had work available for her. However, in December 1994 respondent wrote and advised claimant that they now did have accommodated work available within her restrictions. Because of a death in the family claimant was unable to accept the accommodated position until February 1995.

The offer of accommodated employment was summarized in a memorandum signed by Marsha Andrews, nursing center administrator. The offer describes restrictions recommended by Dr. Manguoglu and states that it is claimant's responsibility not to exceed Dr. Manguoglu's restrictions. Those restrictions include the previously mentioned 55 pound lifting limit and a prohibition against forward bending and twisting more than one-third of the time at work. The offer of accommodated employment was in effect an offer to perform regular duties as a nurse's aid with the advice and permission not to perform activities which violated the medical restrictions. On advice of counsel, claimant refused to sign an agreement to work within those restrictions. She did, nevertheless, begin working for respondent on February 4, 1995. On February 16, 1995, claimant resigned her employment with respondent indicating that she could not perform the work.

As indicated, claimant contends the offer of accommodation was unreasonable. The Appeals Board agrees that the method of accommodation created several problems. The evidence establishes that claimant worked, caring for patients, in an environment with an ongoing potential for a sudden emergency need to violate the restrictions for the safety of the patients. Assisting patients in and out of wheel chairs and assisting patients to and from

restroom facilities carried with it the possibility that the patient will unexpectedly fall. As claimant's counsel points out, the accommodation did not give claimant a clear method of avoiding violation of the restrictions. It included only the very general direction to perform her duties without violating the restrictions.

The Appeals Board also agrees, on the other hand, that a claimant who is performing accommodated work should advise the employer of problems working within the restrictions and afford the employer the opportunity to adjust or at least to decide whether it wants to adjust the accommodation. The failure on the part of the employee to do so would in many cases be strong evidence that claimant is not making a good faith effort.

In this case, however, the totality of the circumstances does not, in our opinion, warrant a conclusion that the claimant's conduct was the equivalent of refusing to attempt to perform accommodated employment. First, as indicated, the offer of accommodation did not provide any specific method for claimant to avoid violation of her restrictions in performing her duties for respondent. Under these circumstances, claimant could quite reasonably conclude that she would not be able to perform the job duties in the medically-recommended restrictions. Second, the restrictions of the treating physician as well as the restrictions by Dr. Koprivica, suggest that it would have been very difficult to have accommodated those restrictions. Dr. Manguoglu modified his restrictions in response to a functional capacity evaluation performed after claimant left employment with respondent. Dr. Manguoglu agreed that he would not recommend claimant go back to doing the job she was doing in the nursing center. He stated that he would not recommend she do so unless there were some kind of desk job she could do. These factors lead the Appeals Board to conclude that claimant's conduct was not tantamount to refusing to accept accommodated work and, therefore, not subject to the rules announced in Foulk.

Under the provisions of K.S.A. 44-510e, as amended, the wage prong of work disability is based upon the difference between what the claimant's average weekly wage is after the injury and claimant's average weekly wage at the time of the injury. In this case, the difference is 100 percent. The wage prong is to averaged together with the task loss factor. In this case the Appeals Board concludes, as did the Special Administrative Law Judge, that claimant has a 25 percent task loss factor based upon the testimony of Dr. Koprivica. When the task loss and the wage factors are averaged together the result is a 62.5 percent work disability.

The Appeals Board notes that respondent has argued that claimant's disability should be reduced because a portion of the disability preexisted the injury at issue in this case. This argument is based upon the testimony of Dr. Manguoglu that 3 percent of the total 10 percent functional impairment would have preexisted the injury. The deduction is required by K.S.A. 44-501 and the Award should, therefore, be based on 59.5 percent disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin dated should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ingeburg Hunsecker, and against the respondent, Enterprise Estates Nursing Center, and its insurance carrier, Kansas Association for Homes for the Aging Insurance Group, Inc., for an accidental injury which occurred August 10, 1993 and based upon an average weekly wage of $210.20 for 33 weeks of temporary total disability compensation at the rate of $140.14 per week or $4,624.62, followed by 236.22 weeks at the rate of $140.14 per week or $33,103.87, for a 59.5% permanent partial work disability, making a total award of $37,728.49.

As of December 15, 1996 there is due and owing claimant 33 weeks of temporary total disability compensation at the rate of $140.14 per week or $4,624.62, followed by 141.71 weeks of permanent partial compensation at the rate of $140.14 per week in the sum of $19,859.24 for a total of $24,483.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $13,244.63 is to be paid for 94.51 weeks at the rate of $140.14 per week, until fully paid or further order of the Director.

Claimant is entitled to future medical treatment after proper application to and approval by the Director.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier as follows:

Curtis, Schloetzer, Hedberg, Foster & Assoc.	
Transcript of Regular Hearing	$302.20
Owens, Brake, Cowan & Assoc.	
Deposition of Ali B. Manguoglu, M.D.	$261.65
Deposition of Christa Baker	$145.87
Deposition of Shirley Wilson	$145.88
Deposition of Naomia Johnson	$190.98
Deposition of Susan Reindl	$154.07
Appino & Biggs Reporting Service	
Deposition of Dick Santner	$135.00
Deposition of Marsha Andrews	$299.90
Gene Dolginoff Associates, LTD	
Deposition of P. Brent Koprivica, M.D.	$318.40
Statutory Special Administrative Law Judge Fee	$150.00

IT IS SO ORDERED.

Dated this _____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Jeffrey A. Chanay, Topeka, KS
Douglas F. Martin, Special Administrative Law Judge
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director